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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition we explain that the decision of the court of appeals tendered for review discards a fundamental limitation upon the scope of the environmental analysis mandated by the National Environmental Policy Act. That limitation, firmly anchored in the plain language of the statute (see 42 U.S.C. 4332(2)(C)(i)), is simply that analysis is required only of those effects of contemplated federal action that are traceable to the impact of the action upon the natural or physical environment. It is only such effects that may plausibly be considered "*environmental* impact[s] of [a] proposed action" (*ibid.*; emphasis added). Rather than confront the thrust of our argument, respondent People Against Nuclear Energy

(PANE) attempts to turn it aside. Several points raised by respondent warrant response.[1]

1. Respondent's primary contention (Br. in Opp. 41-46) is that the decision of the court of appeals is consistent with the limitation, emphasized in our petition, upon the scope of the environmental statement that NEPA requires. Respondent suggests that our petition presents no more than a factual dispute as to whether the alleged mental health effects are traceable to the physical environmental impact of restarting the TMI-1 reactor (Br. in Opp. 45-46). Respondent's suggestion is disingenuous. The issue in this case has at all times been regarded as a purely legal one; respondent has never before suggested otherwise.[2] Like the Commission and all of the parties, the court of appeals treated the issue as a purely legal one as well (see 81-2399 Pet. App. 11a-17a). That court plainly did not view the question whether or not NEPA requires the analysis which its judgment uncon-

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[1] Contrary to respondent's suggestion (Br. in Opp. 3-4), our petition does not "seek a ruling" that the mental health effects of restart at TMI-1 "should not be considered by the Nuclear Regulatory Commission." The issue, of course, is not whether consideration of such effects is prudent or wise policy, but whether, absent an environmental basis for such effects, NEPA requires that they be formally analyzed. It is not our petition, but the court of appeals decision, that improperly blurs the line between law and policy. See 81-2399 Pet. App. 17a ("We cannot believe that the psychological aftermath of the March 1979 accident falls outside the broad scope of [NEPA]."). We note that the court of appeals rejected respondent's contention that the Atomic Energy Act requires consideration of the mental health effects of the restart decision; respondent has evidently chosen not to seek further review of that decision.

[2] The Commission framed the issue as whether accident-related psychological distress that was "*unrelated* directly to exposure to radiation" was "legally * * * relevant to th[e] [restart] proceeding." *In re Metropolitan Edison Co.*, 10 N.R.C. 141, 148 (1979) (emphasis added). Both the Licensing Board and the Commission framed the issue in legal terms (see Pet. 4-9) and respondent never argued at any point in those proceedings or in the court of appeals that disposition of the issue required resolution of factual matters.

ditionally requires as turning upon an unresolved question of fact that was not mentioned, much less directed to be considered by the Commission on remand (see 81-2399 Pet. App. 29a-30a).

In any event, there is no issue of fact to be considered. Respondent is unable, even now, to suggest how the mental health effects outlined in its draft contentions can be traced to the environmental effects of the proposed federal action. Indeed, respondent's efforts (Br. in Opp. 32-33, 42-45) to demonstrate the necessary causal nexus simply underscore the absence of the required connection. Thus, respondent argues that NEPA mandates assessment of the mental health effects of restart because:

1) the TMI-2 accident caused releases of radiation—an environmental effect;

2) the TMI-2 accident threatened to cause other, more serious, environmental effects;

3) apprehension caused by the TMI-2 accident engendered mental health effects;

4) restart of TMI-1 creates potential for future radiation releases or even a serious nuclear accident; and

5) restart of TMI-1 may exacerbate the stresses caused by the TMI-2 accident.

The foregoing premises, however, are insufficient to establish that any stress that may be occasioned by the restart decision is in any way traceable to the environmental effects, potential or certain, that would be attributable to restart. Respondent simply demonstrates that potential environmental effects and mental health effects flow from a common source. But as we explain in our petition (Pet. 17), NEPA requires assessment only of the environmental impacts of major, environmentally significant, federal actions—not assessment of all of the effects of such actions.

Because the Commission recognizes that it must consider what respondent characterizes as the "holocaust potential" of a major nuclear accident—i.e., that it must

assess the environmental effects of such an accident—respondent reasons that (Br. in Opp. 45):

> That holocaust potential * * * is precisely the sort of impact on the natural or physical environment that the Commission argues must be the proximate cause of any psychological health damage to be considered under NEPA.

Petitioner thus identifies "holocaust potential" as the environmental cause of the mental health problems they tender for analysis under NEPA. *Quod erat demonstrandum.* But this is no more than a play upon words. As we explain in our petition (Pet. 23-24), NEPA may require the consideration of events—such as a major nuclear accident—that are quite unlikely to occur but that would entail substantial environmental effects if they occurred.[3] Such a major accident may perhaps be labeled a "potential holocaust." But it does not follow that the mental health effects of the possibility (which respondent labels "holocaust potential") of a major nuclear accident entailing environmental effects are themselves environmentally caused.[4] On the contrary, respondent's analysis,

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[3] Thus, respondent errs in characterizing (Br. in Opp. 43 n.37) our argument as holding that "psychological health damage related to the restart of Unit 1 cannot be considered because there is no realistic probability of an accident." The question whether a major nuclear accident is so unlikely as to place the environmental effects of such an accident entirely outside the scope of NEPA analysis is not presented here. Neither does our argument depend in any way upon characterization of respondent's members' fears as irrational.

[4] That respondent's argument rests on semantic legerdemain is clear from its pervasive relevance upon such verbal formulations to avoid our argument. See, *e.g.*, Br. in Opp. 12 (The alleged "psychological health damage * * * is directly related to the *potential* of a nuclear reactor to cause overwhelming damage to the human environment."), 38 (The alleged mental health effects "involve[] a *concern related to the prospect* of further devastating impact on the physical environment."), 53 ("Restart of [TMI-1] would sig-

like the court of appeals' decision, plainly requires consideration of the nonenvironmental effects of federal action.[5]

2. Respondent also claims (Br. in Opp. 47-54) that an impact upon the natural or physical environment is not needed to trigger the assessment obligations imposed by NEPA, seeking support in the legislative history of NEPA and Council on Environmental Quality (CEQ) regulations for that view. The search is unavailing, for respondent's argument is directed at a straw man.

It is not our submission that effects upon human beings are for that reason excluded from the scope of analysis under NEPA. Rather, the point of our argument is simply that NEPA covers only those effects of federal action upon man that are propagated through environmental variables. Thus, contrary to respondent's assertion (Br. in Opp. 47-49), our argument in no respect

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nificantly affect the human environment * * * by significantly altering the *psychological context* for local residents") (emphasis added). Most revealing is respondent's ingenuous explanation (Br. in Opp. 53-54 n.45) that:

> The fact that this health damage derives from an alteration of the human environment is most clearly illustrated by the fact that if people were to move away—to a different human environment—they would not suffer the same damage to their health upon the restart of TMI-1.

Similar statements—all literally correct—could be made about any federal action that affects people in any manner.

[5] The additional factual issues canvassed by respondent (Br. in Opp. 57-60) simply are not relevant to the question presented by our petition. Respondent does not suggest that proceedings upon remand will address the issues canvassed and thereby make unnecessary a decision upon the question now presented. In fact the judgment of the court of appeals does not direct the Commission to address any of the issues noted by respondent. Moreover, contrary to the respondent's suggestion (Br. in Opp. 61), the Commission is not now engaged in developing a factual record respecting these issues; similarly inaccurate is the American Psychological Association's statement (Br 7) that the Commission has "reopened its docket" to receive evidence respecting psychological stress.

detracts from the central focus of NEPA upon the "human environment" (42 U.S.C. 4332(2)(C)). A major federal action significantly affecting the quality of man's environment is assuredly the statutory trigger for preparation of an environmental impact statement. *Ibid.* But it is equally clear that the statement required need only address the "environmental impact of the proposed action" (42 U.S.C. 4332(2)(C)(i))—and thus that it need not address *non-environmental* effects of federal action whether upon human beings or otherwise. In short, our submission would not, as charged, read out of the statute the intended focus upon the *human* environment; it is respondent and the court of appeals that have rewritten the statute by eliminating the requirement that the effects of federal action to be addressed be *environmental.*

Respondent's reliance (Br. in Opp. 50-52) upon CEQ regulations is equally unavailing. As is explained in our petition (Pet. 19-20 n.14), the CEQ regulations do not purport to define the term "environmental" for the purposes of 42 U.S.C. 4332(2)(C)(i) (requiring a "detailed statement" on "the environmental impact of the proposed action"). The broad definition of the terms "impacts" and "effects" contained in the regulations (40 C.F.R. 1508.8)[6] upon which respondent relies does not dispense with the separate *statutory* directive that the impacts to be surveyed under NEPA be *environmental*—i.e., environmentally grounded or caused; nor could they be effective to achieve that result. That the CEQ regulations do not sanction expansion of the duties imposed by NEPA in the manner suggested by respondent is underscored by other provisions of the regulations. See 40 C.F.R. 1502.10(e), 1502.16 and 1508.14.[7]

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[6] The regulations treat these terms as synonymous. 40 C.F.R. 1508.8(b). The pertinent definition provides that "[e]ffects includes ecological * * * aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." *Ibid.*

[7] The regulations repeatedly describe the portion of an environmental impact statement that fulfills the requirements of 42 U.S.C. 4332(2)(C)(i) as a statement of the "[e]nvironmental [c]onse-

3. Respondent's effort (Br. in Opp. 33-38) to distinguish this case from the numerous decisions of other courts of appeal with which it conflicts (see Pet. 25-26) likewise fails. There is no need to respond here to the factual distinctions propounded by respondent. Those distinctions are simply unresponsive to our argument and can not serve to reconcile the decision of the court of appeals below with the numerous decisions of the courts of appeals recognizing that identification of an environmental cause is the "trigger" for any duty under NEPA to analyze an effect of federal action.[8] There can be little doubt that that application of the law as announced in the decisions we cite would result in a judgment for petitioners. Accordingly, the existing conflict of authorities requires this Court's attention.[9]

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quences" of the proposed action (40 C.F.R. 1502.10(e) and 1502.16). Moreover, the regulations specify that the statutory term "[h]uman [e]nvironment" embraces "the natural and physical environment and the relationship of people with that environment" (40 C.F.R. 1508.14). The Council's explanatory comment (43 Fed. Reg. 55988 (1978)), stressed by respondent, indicating that it was not CEQ's intention to limit the foregoing definition of the human environment "to the natural and physical aspects of the environment" merely reaffirms that the concern for the environmental effects of federal action extends to people as well as plants, animals and inanimate objects The Council plainly did not intend by this language to suggest that all aspects of every major federal action significantly affecting mankind be the subject of an "environmental" impact statement.

[8] Respondent suggests (Br. in Opp. 38) that the decision in *Como-Falcon Community Coalition, Inc.* v. *Department of Labor*, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980), rests upon a factual finding that the socioeconomic effects in question there were insignificant. On the contrary, although the district court in that case had made such a finding (see 609 F.2d at 345), the court of appeals expressly held that the "district court erred" in considering these issues, and that they were as a matter of law outside NEPA. *Id.* at 345-346.

[9] Respondent's assurances (Br. in Opp. 32, 62) that the decision in this case is "unique" and would not control any other circum-

4. In closing, we pause to note respondent's contention (Br. in Opp. 28-31) that the petitions in this case present purely "hypothetical concerns" unworthy of this Court's attention. This claim rests upon respondent's contention that the NRC could comply with the court of appeals order without delaying restart of TMI-1. That contention is not necessarily correct; in any event it provides no basis for denying certiorari.

a. Contrary to respondent's intimation, the delay to date in proceeding with the evaluation necessitated by the court's decision results principally from the complexity of the task imposed by the court.[10] As PANE observes (Br. in Opp. 29), only four weeks after the court's initial judgment was rendered—more than three months before the court issued its opinions—the Commission's staff convened a panel of prominent social scientists to discuss how the Commission could obtain the information needed to comply with the court's decision. The consensus of the participants was that collecting the necessary data on the probable psychological effects of resumed operation would require the formulation and administration of new survey instruments. One of the participants was given the task of developing the necessary survey. The NRC staff transmitted the resulting draft survey instrument to the

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stances provides little comfort. As the private petitioners have noted (81-2399 Reply Brief 5 & n.7) the court of appeals' decision has prompted significant litigation designed to press the D.C. Circuit's rationale to its logical conclusion. We note as well the decision in *City of New York* v. *United States Department of Transportation*, 539 F. Supp. 1237, 1273-1274 (S.D.N.Y. 1982), appeal pending, Nos. 82-6094, 82-6200 (2d Cir.), holding that the consequences of fear produced by shipment of radioactive materials must be addressed under NEPA in connection with the promulgation of federal regulations governing that subject.

[10] That task was complicated by the fact that after three months of effort directed at compliance with the court of appeals' January 7 interim judgment, the Commission found those directives substantially altered by the issuance of the court's Amended Judgment on April 2, 1982.

National Institute of Mental Health requesting comments upon the scientific validity of the proposed study. It was subsequently determined that the survey instrument needed substantial refinement, and the survey was withdrawn for revisions that are still underway.

Contrary to respondent's suggestion, even if the Commission were now to proceed with maximum dispatch to complete the determination required by the court of appeals it is highly unlikely that the Commission could do so before the time that technical difficulties that now preclude restart are resolved.[11] Even if the Commission's evaluation of psychological effects of restarting TMI-1 could be completed before the time at which the plant is otherwise ready to be restarted, there is no guarantee that its evaluation would satisfy the court of appeals.[12] Thus there is a substantial likelihood that compliance with the court of appeals' decision, no matter how energetically pursued by the Commission, would result in a delay in restarting the reactor (assuming that all other legal barriers to restart have been resolved by appropriate commission action by that time).

b. More fundamentally, it is entirely irrelevant that the Commission might be able to comply with the court of appeals' decision. The existence of practical difficulties that delay restart here is purely fortuitous. It would be a novel and unfair rule of law that would require a party to forego the opportunity for appellate review of a decision, believed to be erroneous, that imposes legal obliga-

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[11] According to current projections, restart may become technically feasible by March 1, 1983.

[12] PANE has asserted that the Commission may not allow restart of TMI-1 without reopening the restart hearing to consider a full supplement environmental impact statement on the psychological impacts of restart. Response to Licensee's Motion with Respect to Psychological Health Issue (filed June 3, 1982), *In re Metropolitan Edison Co.*, No. 50-289. It accordingly ill behooves respondent to make light of the procedural burden imposed by the court of appeals upon the Commission.

tions, simply because compliance is physically possible. Respondent has not suggested that compliance would be cost-free or inexpensive and no such suggestion would be credible here.

For the foregoing reasons as well as those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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